

In the Senate of the United States,

November 14, 2002.

Resolved, That the bill from the House of Representatives (H.R. 5469) entitled “An Act to amend title 17, United States Code, with respect to the statutory license for webcasting, and for other purposes.”, do pass with the following

AMENDMENT:

Strike out all after the enacting clause and insert:

1 ***SECTION 1. SHORT TITLE.***

2 *This Act may be cited as the “Small Webcaster Settle-*
3 *ment Act of 2002”.*

1 **SEC. 2. FINDINGS.**

2 *Congress finds the following:*

3 *(1) Some small webcasters who did not partici-*
4 *pate in the copyright arbitration royalty panel pro-*
5 *ceeding leading to the July 8, 2002 order of the Li-*
6 *brarian of Congress establishing rates and terms for*
7 *certain digital performances and ephemeral reproduc-*
8 *tions of sound recordings, as provided in part 261 of*
9 *the Code of Federal Regulations (published in the*
10 *Federal Register on July 8, 2002) (referred to in this*
11 *section as “small webcasters”), have expressed reserva-*
12 *tions about the fee structure set forth in such order,*
13 *and have expressed their desire for a fee based on a*
14 *percentage of revenue.*

15 *(2) Congress has strongly encouraged representa-*
16 *tives of copyright owners of sound recordings and rep-*
17 *resentatives of the small webcasters to engage in nego-*
18 *tiations to arrive at an agreement that would include*
19 *a fee based on a percentage of revenue.*

20 *(3) The representatives have arrived at an agree-*
21 *ment that they can accept in the extraordinary and*
22 *unique circumstances here presented, specifically as to*
23 *the small webcasters, their belief in their inability to*
24 *pay the fees due pursuant to the July 8 order, and*
25 *as to the copyright owners of sound recordings and*
26 *performers, the strong encouragement of Congress to*

1 *reach an accommodation with the small webcasters on*
2 *an expedited basis.*

3 (4) *The representatives have indicated that they*
4 *do not believe the agreement provides for or in any*
5 *way approximates fair or reasonable royalty rates*
6 *and terms, or rates and terms that would have been*
7 *negotiated in the marketplace between a willing buyer*
8 *and a willing seller.*

9 (5) *Congress has made no determination as to*
10 *whether the agreement provides for or in any way ap-*
11 *proximates fair or reasonable fees and terms, or rates*
12 *and terms that would have been negotiated in the*
13 *marketplace between a willing buyer and a willing*
14 *seller.*

15 (6) *Congress likewise has made no determination*
16 *as to whether the July 8 order is reasonable or arbi-*
17 *trary, and nothing in this Act shall be taken into ac-*
18 *count by the United States Court of Appeals for the*
19 *District of Columbia Circuit in its review of such*
20 *order.*

21 (7) *It is, nevertheless, in the public interest for*
22 *the parties to be able to enter into such an agreement*
23 *without fear of liability for deviating from the fees*
24 *and terms of the July 8 order, if it is clear that the*
25 *agreement will not be admissible as evidence or other-*

1 *wise taken into account in any government pro-*
 2 *ceeding involving the setting or adjustment of the roy-*
 3 *alties payable to copyright owners of sound recordings*
 4 *for the public performance or reproduction in ephem-*
 5 *eral phonorecords or copies of such works, the deter-*
 6 *mination of terms or conditions related thereto, or the*
 7 *establishment of notice or recordkeeping requirements.*

8 **SEC. 3. SUSPENSION OF CERTAIN PAYMENTS.**

9 (a) **NONCOMMERCIAL WEBCASTERS.**—

10 (1) *IN GENERAL.*—*The payments to be made by*
 11 *noncommercial webcasters for the digital performance*
 12 *of sound recordings under section 114 of title 17,*
 13 *United States Code, and the making of ephemeral*
 14 *phonorecords under section 112 of title 17, United*
 15 *States Code, during the period beginning on October*
 16 *28, 1998, and ending on May 31, 2003, which have*
 17 *not already been paid, shall not be due until June 20,*
 18 *2003.*

19 (2) *DEFINITION.*—*In this subsection, the term*
 20 *“noncommercial webcaster” has the meaning given*
 21 *that term in section 114(f)(5)(E)(i) of title 17, United*
 22 *States Code, as added by section 4 of this Act.*

23 (b) **SMALL COMMERCIAL WEBCASTERS.**—

24 (1) *IN GENERAL.*—*The receiving agent may, in*
 25 *a writing signed by an authorized representative*

1 *thereof, delay the obligation of any 1 or more small*
 2 *commercial webcasters to make payments pursuant to*
 3 *sections 112 and 114 of title 17, United States Code,*
 4 *for a period determined by such entity to allow nego-*
 5 *tiations as permitted in section 4 of this Act, except*
 6 *that any such period shall end no later than Decem-*
 7 *ber 15, 2002. The duration and terms of any such*
 8 *delay shall be as set forth in such writing.*

9 (2) *DEFINITIONS.—In this subsection—*

10 (A) *the term “webcaster” has the meaning*
 11 *given that term in section 114(f)(5)(E)(iii) of*
 12 *title 17, United States Code, as added by section*
 13 *4 of this Act; and*

14 (B) *the term “receiving agent” shall have*
 15 *the meaning given that term in section 261.2 of*
 16 *title 37, Code of Federal Regulations, as pub-*
 17 *lished in the Federal Register on July 8, 2002.*

18 **SEC. 4. AUTHORIZATION FOR SETTLEMENTS.**

19 *Section 114(f) of title 17, United States Code, is*
 20 *amended by adding after paragraph (4) the following:*

21 *“(5)(A) Notwithstanding section 112(e) and the*
 22 *other provisions of this subsection, the receiving agent*
 23 *may enter into agreements for the reproduction and*
 24 *performance of sound recordings under section 112(e)*
 25 *and this section by any 1 or more small commercial*

1 *webcasters or noncommercial webcasters during the*
2 *period beginning on October 28, 1998, and ending on*
3 *December 31, 2004, that, once published in the Fed-*
4 *eral Register pursuant to subparagraph (B), shall be*
5 *binding on all copyright owners of sound recordings*
6 *and other persons entitled to payment under this sec-*
7 *tion, in lieu of any determination by a copyright ar-*
8 *bitration royalty panel or decision by the Librarian*
9 *of Congress. Any such agreement for small commer-*
10 *cial webcasters shall include provisions for payment*
11 *of royalties on the basis of a percentage of revenue or*
12 *expenses, or both, and include a minimum fee. Any*
13 *such agreement may include other terms and condi-*
14 *tions, including requirements by which copyright*
15 *owners may receive notice of the use of their sound re-*
16 *cordings and under which records of such use shall be*
17 *kept and made available by small commercial*
18 *webcasters or noncommercial webcasters. The receiv-*
19 *ing agent shall be under no obligation to negotiate*
20 *any such agreement. The receiving agent shall have*
21 *no obligation to any copyright owner of sound record-*
22 *ings or any other person entitled to payment under*
23 *this section in negotiating any such agreement, and*
24 *no liability to any copyright owner of sound record-*

1 *ings or any other person entitled to payment under*
2 *this section for having entered into such agreement.*

3 *“(B) The Copyright Office shall cause to be pub-*
4 *lished in the Federal Register any agreement entered*
5 *into pursuant to subparagraph (A). Such publication*
6 *shall include a statement containing the substance of*
7 *subparagraph (C). Such agreements shall not be in-*
8 *cluded in the Code of Federal Regulations. Thereafter,*
9 *the terms of such agreement shall be available, as an*
10 *option, to any small commercial webcaster or non-*
11 *commercial webcaster meeting the eligibility condi-*
12 *tions of such agreement.*

13 *“(C) Neither subparagraph (A) nor any provi-*
14 *sions of any agreement entered into pursuant to sub-*
15 *paragraph (A), including any rate structure, fees,*
16 *terms, conditions, or notice and recordkeeping re-*
17 *quirements set forth therein, shall be admissible as*
18 *evidence or otherwise taken into account in any ad-*
19 *ministrative, judicial, or other government proceeding*
20 *involving the setting or adjustment of the royalties*
21 *payable for the public performance or reproduction in*
22 *ephemeral phonorecords or copies of sound recordings,*
23 *the determination of terms or conditions related there-*
24 *to, or the establishment of notice or recordkeeping re-*
25 *quirements by the Librarian of Congress under para-*

1 *graph (4) or section 112(e)(4). It is the intent of Con-*
 2 *gress that any royalty rates, rate structure, defini-*
 3 *tions, terms, conditions, or notice and recordkeeping*
 4 *requirements, included in such agreements shall be*
 5 *considered as a compromise motivated by the unique*
 6 *business, economic and political circumstances of*
 7 *small webcasters, copyright owners, and performers*
 8 *rather than as matters that would have been nego-*
 9 *tiated in the marketplace between a willing buyer and*
 10 *a willing seller, or otherwise meet the objectives set*
 11 *forth in section 801(b).*

12 *“(D) Nothing in the Small Webcaster Settlement*
 13 *Act of 2002 or any agreement entered into pursuant*
 14 *to subparagraph (A) shall be taken into account by*
 15 *the United States Court of Appeals for the District of*
 16 *Columbia Circuit in its review of the determination*
 17 *by the Librarian of Congress of July 8, 2002, of rates*
 18 *and terms for the digital performance of sound re-*
 19 *cordings and ephemeral recordings, pursuant to sec-*
 20 *tions 112 and 114.*

21 *“(E) As used in this paragraph—*

22 *“(i) the term ‘noncommercial webcaster’*
 23 *means a webcaster that—*

1 “(I) is exempt from taxation under sec-
2 tion 501 of the Internal Revenue Code of
3 1986 (26 U.S.C. 501);

4 “(II) has applied in good faith to the
5 Internal Revenue Service for exemption
6 from taxation under section 501 of the In-
7 ternal Revenue Code and has a commer-
8 cially reasonable expectation that such ex-
9 emption shall be granted; or

10 “(III) is operated by a State or posses-
11 sion or any governmental entity or subordi-
12 nate thereof, or by the United States or Dis-
13 trict of Columbia, for exclusively public
14 purposes;

15 “(ii) the term ‘receiving agent’ shall have
16 the meaning given that term in section 261.2 of
17 title 37, Code of Federal Regulations, as pub-
18 lished in the Federal Register on July 8, 2002;
19 and

20 “(iii) the term ‘webcaster’ means a person
21 or entity that has obtained a compulsory license
22 under section 112 or 114 and the implementing
23 regulations therefor to make eligible nonsubscrip-
24 tion transmissions and ephemeral recordings.

1 “(F) *The authority to make settlements pursuant*
 2 *to subparagraph (A) shall expire December 15, 2002,*
 3 *except with respect to noncommercial webcasters for*
 4 *whom the authority shall expire May 31, 2003.”.*

5 **SEC. 5. DEDUCTIBILITY OF COSTS AND EXPENSES OF**
 6 **AGENTS AND DIRECT PAYMENT TO ARTISTS**
 7 **OF ROYALTIES FOR DIGITAL PERFORMANCES**
 8 **OF SOUND RECORDINGS.**

9 (a) *FINDINGS.—Congress finds that—*

10 (1) *in the case of royalty payments from the li-*
 11 *censing of digital transmissions of sound recordings*
 12 *under subsection (f) of section 114 of title 17, United*
 13 *States Code, the parties have voluntarily negotiated*
 14 *arrangements under which payments shall be made*
 15 *directly to featured recording artists and the adminis-*
 16 *trators of the accounts provided in subsection (g)(2)*
 17 *of that section;*

18 (2) *such voluntarily negotiated payment ar-*
 19 *rangements have been codified in regulations issued*
 20 *by the Librarian of Congress, currently found in sec-*
 21 *tion 261.4 of title 37, Code of Federal Regulations, as*
 22 *published in the Federal Register on July 8, 2002;*

23 (3) *other regulations issued by the Librarian of*
 24 *Congress were inconsistent with the voluntarily nego-*
 25 *tiated arrangements by such parties concerning the*

1 *deductibility of certain costs incurred for licensing*
2 *and arbitration, and Congress is therefore restoring*
3 *those terms as originally negotiated among the par-*
4 *ties; and*

5 *(4) in light of the special circumstances described*
6 *in this subsection, the uncertainty created by the reg-*
7 *ulations issued by the Librarian of Congress, and the*
8 *fact that all of the interested parties have reached*
9 *agreement, the voluntarily negotiated arrangements*
10 *agreed to among the parties are being codified.*

11 *(b) DEDUCTIBILITY.—Section 114(g) of title 17,*
12 *United States Code, is amended by adding after paragraph*
13 *(2) the following:*

14 *“(3) A nonprofit agent designated to distribute*
15 *receipts from the licensing of transmissions in accord-*
16 *ance with subsection (f) may deduct from any of its*
17 *receipts, prior to the distribution of such receipts to*
18 *any person or entity entitled thereto other than copy-*
19 *right owners and performers who have elected to re-*
20 *ceive royalties from another designated agent and*
21 *have notified such nonprofit agent in writing of such*
22 *election, the reasonable costs of such agent incurred*
23 *after November 1, 1995, in—*

24 *“(A) the administration of the collection,*
25 *distribution, and calculation of the royalties;*

1 “(B) the settlement of disputes relating to
2 the collection and calculation of the royalties;
3 and

4 “(C) the licensing and enforcement of rights
5 with respect to the making of ephemeral record-
6 ings and performances subject to licensing under
7 section 112 and this section, including those in-
8 curred in participating in negotiations or arbi-
9 tration proceedings under section 112 and this
10 section, except that all costs incurred relating to
11 the section 112 ephemeral recordings right may
12 only be deducted from the royalties received pur-
13 suant to section 112.

14 “(4) Notwithstanding paragraph (3), any des-
15 ignated agent designated to distribute receipts from
16 the licensing of transmissions in accordance with sub-
17 section (f) may deduct from any of its receipts, prior
18 to the distribution of such receipts, the reasonable
19 costs identified in paragraph (3) of such agent in-
20 curred after November 1, 1995, with respect to such
21 copyright owners and performers who have entered
22 with such agent a contractual relationship that speci-
23 fies that such costs may be deducted from such royalty
24 receipts.”.

1 (c) *DIRECT PAYMENT TO ARTISTS.*—Section 114(g)(2)
 2 of title 17, United States Code, is amended to read as fol-
 3 lows:

4 “(2) An agent designated to distribute receipts
 5 from the licensing of transmissions in accordance
 6 with subsection (f) shall distribute such receipts as
 7 follows:

8 “(A) 50 percent of the receipts shall be paid
 9 to the copyright owner of the exclusive right
 10 under section 106(6) of this title to publicly per-
 11 form a sound recording by means of a digital
 12 audio transmission.

13 “(B) 2¹/₂ percent of the receipts shall be de-
 14 posited in an escrow account managed by an
 15 independent administrator jointly appointed by
 16 copyright owners of sound recordings and the
 17 American Federation of Musicians (or any suc-
 18 cessor entity) to be distributed to nonfeatured
 19 musicians (whether or not members of the Amer-
 20 ican Federation of Musicians) who have per-
 21 formed on sound recordings.

22 “(C) 2¹/₂ percent of the receipts shall be de-
 23 posited in an escrow account managed by an
 24 independent administrator jointly appointed by
 25 copyright owners of sound recordings and the

1 *American Federation of Television and Radio*
 2 *Artists (or any successor entity) to be distributed*
 3 *to nonfeatured vocalists (whether or not members*
 4 *of the American Federation of Television and*
 5 *Radio Artists) who have performed on sound re-*
 6 *cordings.*

7 “(D) 45 percent of the receipts shall be
 8 paid, on a per sound recording basis, to the re-
 9 cording artist or artists featured on such sound
 10 recording (or the persons conveying rights in the
 11 artists’ performance in the sound recordings).”.

12 **SEC. 6. REPORT TO CONGRESS.**

13 *By not later than June 1, 2004, the Comptroller Gen-*
 14 *eral of the United States, in consultation with the Register*
 15 *of Copyrights, shall conduct and submit to the Committee*
 16 *on the Judiciary of the House of Representatives and the*
 17 *Committee on the Judiciary of the Senate a study con-*
 18 *cerning the economic arrangements among small commer-*
 19 *cial webcasters covered by agreements entered into pursuant*
 20 *to section 114(f)(5)(A) of title 17, United States Code, as*
 21 *added by section 4 of this Act, and third parties, and the*

- 1 *effect of those arrangements on royalty fees payable on a*
- 2 *percentage of revenue or expense basis.*

Attest:

Secretary.

107TH CONGRESS
2D SESSION

H. R. 5469

AMENDMENT